

Citation: *R. D. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 125

**Appeal No. AD-13-58**

BETWEEN:

**R. D.**

Applicant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Leave to Appeal Decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: May 30, 2014

## **DECISION**

[1] The Tribunal grants Leave to Appeal to the Appeal Division of the Social Security Tribunal.

## **BACKGROUND**

[2] The Applicant seeks Leave to appeal the decision of the Review Tribunal issued to the parties on May 14, 2013. The Review Tribunal determined that a *Canada Pension Plan, (CPP)*, disability pension was not payable to the Applicant, because it concluded his medical condition was not severe and prolonged.

[3] The Applicant submitted the Application requesting Leave to Appeal, (“the Application”), to the Social Security Tribunal, (“SST”). The Application requesting Leave to appeal was submitted within the time permitted for filing under the *Department of Employment and Social Development Act (DESD Act)*.

## **ISSUE**

[4] The Tribunal must decide if the appeal has a reasonable chance of success.

## **THE LAW**

[5] According to subsections 56(1) and 58(3) of the DESD Act, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal.”

Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[6] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[7] Subsection 58(1) of the DESD Act sets out the grounds of appeal as being limited to the following:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

### **BASIS OF APPLICATION**

[8] The Applicant contends that the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it. As well, he contends the Review Tribunal erred in law in making its decision.

### **ANALYSIS**

[9] An Application for Leave to Appeal is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits. However, the Applicant must make out some arguable case<sup>1</sup> or put forth some arguable ground upon which the proposed appeal might succeed if leave is to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[10] In the Application, Counsel for the Applicant ties the reasons for seeking Leave to the Grounds of the Appeal. Counsel raises four issues that, she submits, constitute errors in the Review Tribunal's decision. First, Counsel asserts the Review Tribunal erred in law in failing to take into consideration the effect of the Applicant's facial disfigurement and speech impediment. She argues that the Tribunal failed to take into account the evidence of Dr. Ferrier regarding the social effect of the Applicant's facial disfigurement on his ability to find work. On reviewing the decision, the Tribunal concurs that the Review Tribunal

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<sup>1</sup> *Calihoo v. Canada (Attorney General)*, [2000] FCJ No. 612 TD at para. 15.

appeared not to have considered the Applicant's physical appearance in its assessment of his ability to obtain and maintain work. The Review Tribunal appeared to have concentrated solely on the Applicant's medical conditions. While consideration of the Applicant's physical appearance may constitute a novel consideration, the Tribunal finds, in all the circumstances of the instant case, that it is one that may not be inappropriate here. The question raised is whether an Applicant can be disabled by way of his or her physical appearance? Leave will be granted on this basis.

[11] The second assertion that Counsel for the Applicant raises is that the Review Tribunal erred in law by failing to properly consider the combined effect of all of the Applicant's medical conditions. Counsel argues that the Review Tribunal considered each of the Applicant's medical conditions individually, when it ought to have considered them in combination. Specifically, Counsel for the Applicant takes issue with the Review Tribunal treatment in paragraph 28 of the Applicant's right arm pain. She contends that the Review Tribunal ought to have found, as advocated by the Applicant's doctor, that his combined medical conditions rendered him disabled within the meaning of CPP paragraph 42(2)(a). This raises the question of whether a Review Tribunal is under a legal obligation to consider the combined effect of an Applicant's medical conditions. The Tribunal is of the view that this question gives rise to an arguable case and would grant leave on this basis also.

[12] The third assertion is that the Review Tribunal was unfair in drawing an adverse inference regarding the severity of the Applicant's leg pain from the treatment received. Counsel for the Applicant takes exception to the Review Tribunal statement that the Applicant's pain was being treated conservatively with the only medication being extra strength Tylenol. She submits that this was a reflection of the choices of the Applicant's doctor and she also submitted that the Applicant was on an otherwise extensive medication regime.

[13] The Tribunal finds that Counsel's disagreement with the Review Tribunal's conclusion concerning the Applicant's use of extra strength Tylenol to address the pain in his lower extremities does not ground an appeal. In analyzing the "severe" criterion, the Review Tribunal makes the following observation:

11] While it is recognized that there is some permanent pain involving the lower extremities, this is being treated conservatively, and the only medication used to address the pain levels is extra strength Tylenol.

Counsel for the Applicant has listed a number of other medications the Applicant takes; however, it is not clear from Counsel's submissions what condition these medications are intended to treat. In any event, the Tribunal finds that, at the hearing, it was open to the Applicant to explain to the Review Tribunal that his pain medication regime had been determined by his doctor. The Tribunal also notes that the Review Tribunal was well aware of and considered the fact that the Applicant was also taking other medications. In the result, the Tribunal is not satisfied that the Review Tribunal erred in its conclusion that the Applicant was taking only extra strength Tylenol to relieve the pain in his lower extremities.

[14] Lastly, Counsel for the Applicant asserts that the Review Tribunal erred in law by failing to apply the principles laid out by the Federal Court in *Villani*. Counsel for the Applicant submits that while the Review Tribunal referred to *Villani* in paragraph 24 of its decision, it failed to consider the Applicant's particular circumstances in its analysis.

[15] On reading the Analysis section of the decision, it is clear that the Review Tribunal's analysis centred on the Applicant's efforts at finding alternative work and retraining. The Review Tribunal found that the evidence supported a conclusion that the Applicant "retained capacity to perform some work." The Tribunal infers that Counsel for the Applicant has concluded that the Review Tribunal's focus on the Applicant's retained capacity for work negated it applying the *Villani* factors to the Applicant's circumstances. Arguably, this raises the question of whether this was an error of law. Accordingly, leave will be granted in regard to this issue.

## **CONCLUSION**

[16] In light of the foregoing analysis, the Application for leave to appeal is granted.

Hazelyn Ross  
Member, Appeal Division